Supreme Court, U.S.
FILED

011481 APR - 9 2002

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Term, 2002

SUSAN M. WEICHERT,

Petitioner,

against

WILLIAM J. BROUSE, Treasurer of County of Oswego,

Respondent.

On Appeal from the Court of Appeals
State of New York

PETITION FOR WRIT OF CERTIORARI

Bert F. Halderman, Esq.
Of Counsel to Petitioner
6075 East Molloy Road, Bldg. 6
Syracuse, New York 13211
(315) 432-9896

Richard C. Mitchell, Esq.
Counsel for Respondent
46 East Bridge Street
Oswego, New York 13126
(315) 349-8296

31PP

QUESTIONS PRESENTED

1. Whether Petitioner was deprived, in the Court below, of rights protected by the due process clause of the 5th and 14th Amendments to the United States Constitution and New York Constitution, Article 1 §6.

2. Whether the judgment of the lower court, dated May 30, 2000 was in violation of Mennonite Board of Missions v. Adams, 462 US 791, 77 L.Ed. 2d 180, 103 S.Ct. 2706 (1983) and the 14th Amendment to the United States Constitution.

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LIST OF ALL PARTIES TO THE PROCEEDING.

1. Bert F. Halderman, Esq., of Counsel to Susan M. Weichert,, Pro Se, Petitioner.

2. Bruce N. Clark, County Attorney for William J. Brouse, Respondent.

OPINIONS BELOW

There was no formal opinion rendered in the New York State Court of Appeals. Its *per curiam-affirmed* decision and mandate are reproduced in appendix A and B respectively to this petition, and no official and unofficial reports of opinions were delivered in the case by other courts or administrative agencies.

JURISDICTION

1. Date of entry of judgment or entry to be reviewed is January 10, 2002. The date of judgment of the Court of Appeals is within 90 days of the filing of this appeal, pursuant to Rule 13 of the Rule of Supreme Court.

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...nor be deprived of life, liberty or property, without due process of law,...".

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

NEW YORK CONSTITUTION, ARTICLE 1 §6.

"No person shall be deprived of life, liberty, or property without due process of law".

STATEMENT OF THE CASE

On or about September 5, 1998, the respondent herein, commenced a prior proceeding in the Supreme Court of the County of Oswego entitled, "Treasurer of the County of Oswego vs. Weichert, et al", Index Number 98-1399, which was an Article 11 foreclosure proceeding and involved one of the real properties at issue herein, 7444 Main Street, Parish, New York. In that prior proceeding, a settlement and stipulation was entered into, allowing petitioner to make payment of all delinquent taxes on that property.

On September 28, 1998; December 30, 1998; February 16, 1999; and March 2, 1999, petitioner offered and tendered payment to respondent for full payment of all delinquent taxes due on the aforesaid property. The letters attached as exhibit "A" to the complaint herein document the truth and veracity of the aforesaid allegation.

On each of the aforesaid dates the respondent refused to

accept payment of the taxes and to mark his records as fully satisfied. As a result thereof, and in accordance with the New York General Obligations Law, there was a full accord and satisfaction of all of the delinquent taxes.

Respondent threatened to sell the aforementioned real property at public auction on October 14, 2000 as a part of the Oswego County tax auction. Because petitioner had no adequate remedy of law, or otherwise, for the irreparable harm and damage done or threatened to be done by the respondent, and because any such sale might contravene prior or future orders of the court, and might divest petitioner of her property without due process, and because the respondent had deeded the aforementioned described real property to the County of Oswego, which said deed contained false recitations , as mentioned in ¶¶10,11 and 12 of petitioner's complaint herein, petitioner filed with the Oswego County Clerk on September 11, 2002, an application for an order to show cause, a summons with

notice, and a verified complaint. At that same time, petitioner purchased and paid for an index number, #00-1692 and RJI, #37-00-0461, as documented by the receipts issued therefore and th. time stamp on the copies given to petitioner. Thereafter, on September 13, 2000 (August is a typographical error), the Honorable John J. Elliott, AJSC, signed and executed the aforementioned order to show cause. That order to show cause, summons with notice and verified complaint were served on respondent and his attorney, Bruce N. Clark September 18, 2000, which said affidavits were filed with the Oswego County Clerk. Respondent served a verified answer on September 26, 2000.

On the return of the order to show cause September 22, 2000, the lower court (Hon. Robert J. Nicholson, JSC) dismissed the order to show cause and complaint, on the grounds that none of the aforementioned pleadings had been filed with the Oswego County Clerk under the index

number issued, nor were they filed at the time of the service upon respondent. This was an erroneous finding.

The Oswego County Clerk's policy is to refuse the issuance of an index number and RJI unless all original papers are filed with the Clerk at the time of the application for index number and RJI.

Respondent and his attorney, Richard C. Mitchell, refused to sign the stipulation settling the record on appeal, forcing petitioner to bring on a motion to settle the said record. Petitioner alleged that such refusal was devious and malicious enough to warrant sanctions; that respondent and his attorney, the County Attorney for the County of Oswego, knew or should have known of the procedures and policy of the Oswego County Clerk's Office, that no receipt for an index number and RJI would be issued by the Oswego County Clerk without first filing of all the original papers, application for index number, and application for RJI, fully and accurately filled in and in quadruplicate, to

be indexed and filed as a civil action and forwarded to the Supreme Court Clerk's Office. This was also known by the lower court because Judge Nicholson was prior County Attorney.

Thereafter, petitioner appealed to the Appellate Division, Fourth Department, which appeal was denied by their order of November 9, 2001.

Thereafter, petitioner appealed to the New York State Court of Appeals for the Second Circuit, which was denied by their order of January 10, 2002. Petitioner submits that these decisions were the result of the parochial nature of these courts and deprived petitioner of due process, as well as confiscation of her $5,500.00 down payment, paid at the tax sale. And $10,000.00 taxes paid, under protest, after an accord and satisfaction of those taxes.

PETITION OF CERTIORARI-

INTRODUCTORY PARAGRAPH

The petitioner, Susan M. Weichert, respectfully prays that a writ of certiorari issue to review and summarily reverse the mandate and decision of the New York State Court of Appeals filed January 10, 2002, the highest court of that state in which a decision could be had, where is drawn in question the validity of the interpretation of the United States Constitution and in particular, the Fifth and Fourteenth Amendments of the United States Constitution, and New York Constitution, Article 1 §6.

ARGUMENT

That the order to show cause signed by the Honorable John J. Elliott, AJSC, on September 13, 2000 and the underlying summons and complaint with exhibits annexed, were filed with the Oswego County Clerk under the above referenced index number on September 11, 2000; affidavits of service were filed at the time of service upon respondent and that the lower court obtained in personam jurisdiction over said respondent and subject matter jurisdiction of this case. Lower court erroneously dismissed this action.

Richard C. Mitchell, attorney for respondent is a Deputy County Attorney for the County of Oswego. His superior, Bruce N. Clark, also listed as attorney for respondent, is the County Attorney. Both have formulated and implemented, as attorneys for the Oswego County Clerk, the procedures and policy of that office which said policy requires that no receipts for an index number or RJI, would be issued by the Oswego County Clerk without first filing of all of the

original papers, application for index number, and application for RJI fully and accurately filled in, and in quadruplicate, to be indexed and filed as a civil action and forwarded to the Supreme Court Clerk's Office.

The receipts issued by the Oswego County Clerk, the time stamp on the order to show cause, all clearly show and indicate that petitioner did file and record the application for the order to show cause, together with supporting papers, the Supreme Court summons with notice, and the verified complaint with the Oswego County Clerk on September 11, 2000. The accusation by Mr. Mitchell and the affidavit of Oswego County Clerk, George J. Williams, indicating that there were no pleadings filed under the above referenced index number is ludicrous and beyond comprehension. They clearly know protocol and procedures of the Oswego County Clerk's Office. A review of the receipts issued and the affidavits of service clearly show that the filing fee was paid, that the original papers were filed

and they were thereafter served. Petitioner cannot be held responsible for the loss of any original papers after they are filed and received by the Oswego County Clerk, and in the hands of the Combined Court system or their agents. At the very least, the lower court should have reconstructed any missing papers from petitioner's and respondent's files; should have investigated the whereabouts of the original papers filed, and of the circumstances of their disappearance while in the hands of the Combined Court system. Petitioner is not responsible or accountable for the judicial system, nor has any control over the delivery of files therein. Petitioner documents that the original papers were filed, the appropriate fees paid, the possession thereby of the court and the service of process thereof.

The General Obligations Law of the State of New York, §15-503(1) requires that a full accord and satisfaction accrued as to any taxes due the County of Oswego and respondent herein.

Petitioner documents that on at least four occasions, she tendered payment to respondent who refused to accept the amount stipulated to in the prior foreclosure proceeding. As a result of that accord and satisfaction, petitioner was not a disqualified bidder at the subsequent tax auction of October 16, 1999. New York Obligations Law §15-503(1); NY Jur 2d 19A Compromise, Accord and Release §1. She should not have been denied two deeds as the successful bidder on two parcels of property listed as catalog #2089-458, 2089-463. The respondent received $5,700.00, in full, and is presently holding those proceeds and converted that amount to Oswego County's use, without due process, in violation of V and XIV Amendments of the United States Constitution and New York Constitution, Article 1 §6.

Respondent's reason for refusing to convey the tax deeds for the two parcels was arbitrary, frivolous, unwarranted and without merit because of the allegations set forth in ¶4,5 and 6 of her verified complaint.

The ex-parte judgment of the lower court dated May 20, 2000 was in violation of Mennonite Board of Missions v. Adams, 462 US 791, 77 L.Ed. 2d 180, 103 S.Ct. 2706 (1983) requiring notice to be given by the County, respondent, to all prior deed owners, lien owners, occupants and such interested parties before selling the real property at a public tax sale. Notice is required to comply with minimal standards of due process as provided by the Fourth Amendment to the United States Constitution. Respondent failed to comply with the aforementioned mandate.

The Supreme Court of Oswego County has visited the subject of this case before (1876-CA 00-01597), Index #00-72. However, in that action, the lower court decided that petitioner had a claim against respondent and dismissed the proceedings in behalf of petitioner's husband, Robert M. Weichert, on the grounds that the claim belonged to petitioner.

That the questions presented herein concerning the

United States Constitution were raised in the lowest court below and preserved on all appeals throughout, but were rejected because of the parochial nature of those courts.

CONCLUSION

The lower court erred in dismissing the order to show cause and complaint herein. This matter should be remanded back to the Supreme Court, Oswego County, with a direction that this action be restored; that any monies paid to respondent be repaid and restored to petitioner, with interest, costs and/or sanctions; that respondent be ordered and directed to convey two tax deeds to petitioner for the two parcels mentioned herein; and further, that an inquest be directed to be held to determine the extent of petitioner's damages that she has suffered as a result of respondent's refusal to convey those two deeds and the deterioration of the properties as a result thereof.

Respectfully submitted,

Bert F. Halderman, Esq. of Counsel to:
Susan M. Weichert, Petitioner
6075 E. Molloy Road, Bldg. 6
Syracuse, New York 13211
(315) 432-9896

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held
In the City of Albany on the
Tenth day of January, 2002

Present, Hon. Judith S. Kaye,
Chief Judge, presiding.

4-10 Mo. No. 1353
Susan M. Weichert,
Appellant,
v.
William J. Brouse, &c.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

1218
PRESENT: PINE, J.P., HURLBUTT, SCUDDER, KEHOE AND GORSKI, JJ.

CA-01-01193
SUSAN M. WEICHERT, Plaintiff-Appellant,

v.

WILLIAM J. BROUSE, Treasurer of County of Oswego, Defendant-Respondent.

Susan M. Weichert, having appealed to this Court from the Order of the Supreme Court, entered in the Oswego County Clerk's Office on November 15, 2000, and said appeal having been submitted by Bert F. Halderman, of counsel for plaintiff-appellant, argued by Richard C. Mitchell of counsel for defendant-respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the Order so appealed from be and the same hereby is affirmed without costs.

Memorandum that is hereby made a part hereof.

All concur, Hurlbutt, J. not participating.

Entered: November 9, 2001

CARL M. DARNELL, Clerk

Supreme Court
Appellate Division,
Fourth Department
Clerk's Office, Rochester, NY

I, CARL M. DARNELL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this December 4, 2001.

CARL M. DARNELL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

(1218) CA 01-01193. (Oswego Co.) –Susan M. Weichert, Plaintiff-Appellant, v. William J. Brouse, Treasurer of County of Oswego, Defendant-Respondent.

Order affirmed without costs.

Memorandum: Supreme Court properly dismissed the complaint for lack of personal and subject matter jurisdiction. "[S]ervice of process without first * filing the initiatory papers is a nullity, the action *** never having been properly commenced" (Matter of Gershel v. Porr, 89 NY2d 327, 330; see, Matter of Fry v. Village of Terrytown, 89 NY2d 714, 719-720).**

All concur, Hurlbutt, J., not participating. (Appeal from Order of Supreme Court, Oswego County, Nicholson, J.-Dismiss Pleading.) PRESENT: PINE, J.P., HURLBUTT, SCUDDER, KEHOE AND GORSKI, JJ. (Filed Nov. 9, 2001.)

At a Motion Term of the Supreme Court of the State of New York, County of Oswego, held at the Oswego County courthouse, 25 East Oneida Street, Oswego, New York on September 22nd, 2000.

PRESENT: Hon. Robert J. Nicholson, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

Susan M. Weichert,
Plaintiff,

v.

ORDER
Index No. 00-1692
RJI No. 37-00-0461

William J. Brouse, Treasurer of the County of Oswego,
Defendant.

This matter having come before this Court by virtue of an Order to Show Cause signed by the Hon. John J. Elliott, A.J.S.C. on August 13th, 2000 and the underlying Summons and Complaint, with exhibits annexed, seeking to enjoin and restrain the Defendant from selling certain tax parcels (catalog numbers 4601-257, 2089-458 and 2089-463) and to remove same from the auction list and to stay all tax

foreclosure proceedings as regards parcel number 4601-257 in the Town of Parish, New York; and Defendant William J. Brouse, Treasurer, through his attorney, having duly interposed an Answer with affirmative defenses and exhibits contained therein, including an affidavit from Oswego County Clerk George J. Williams, sworn to September 20th, 2000, and indicating that there are no pleadings filed under the above referenced index number;

NOW, upon review of the foregoing papers and submissions, and upon Susan M. Weichert, Plaintiff, having appeared by Bert F. Halderman, Esq. and having been heard in support of the Order to Show Cause and underlying papers, and Richard C. Mitchell, Esq., Assistant County Attorney, having personally appeared and been heard in opposition thereto on behalf of the Defendant, and it appearing to the Court that none of the aforementioned pleadings have been filed with the Oswego County Clerk under the above-referenced index number, nor were they

filed at the time of the service of same upon Defendant as is a substantive and necessary condition precedent to the exercise of judicial authority, and it further appearing to the Court that in *personam* jurisdiction over the Defendant and subject matter jurisdiction are, accordingly, absent, and due deliberation having been had thereupon;

NOW, it is hereby:

ORDERED, that the within Order to Show Cause and Complaint are hereby dismissed, in their entirety, without prejudice.

Signed: November 9, 2000.
Oswego, New York

ENTER;

_____

Hon. Robert J. Nicholson
Justice of the Supreme Court

Supreme Court, U.S.
FILED
MAY 8 2002
OFFICE OF THE CLERK

No. 01-1481

IN THE

Supreme Court of the United States

SUSAN M. WEICHERT,

Petitioner,

v.

JOHN W. KRUK, Treasurer of County of Oswego,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

BRIEF IN OPPOSITION

RICHARD C. MITCHELL
OFFICE OF THE OSWEGO COUNTY ATTORNEY
Attorneys for Respondent
Legislative Office Building
46 East Bridge Street
Oswego, New York 13126-2137
(315) 349-8296

173924

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Was the underlying proceeding properly commenced by filing so as to confer *in personam* jurisdiction over the Respondent and subject matter jurisdiction before New York State Supreme Court?

LIST OF PARTIES

The parties to the proceeding below were:

Susan M. Weichert, Petitioner; and

William J. Brouse, Treasurer of the County of Oswego, Respondent.[1]

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1. As of December 31, 2001, William J. Brouse retired as Oswego County Treasurer. On January 1, 2002, John W. Kruk of Fulton, New York, became his duly-elected successor as Oswego County Treasurer.

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Matter of Gershel v. Porr, 89 N.Y.2d 327, 675 N.E.2d 836, 653 N.Y.S.2d 82 (N.Y. Dec 19, 1996 (NO. 261) 6, 12, 13, 14

Matter of Parkinson v. Leahy, 277 A.D.2d 810 (A.D. 3d Dept. 2000) 14

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Matter of Robert M. Weichert v. Brouse 720 N.Y.S.2d 77, 278 A.D.2d 952, 2000 N.Y. Slip Op. 11515, *lv. to appeal den.*, 725 N.Y.S.2d 278 4

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Matter of Susan Weichert v. Brouse, 288 A.D.2d 841, 732 N.Y.S.2d 186, 2001 N.Y. Slip. Op. 08586 (N.Y.A.D. 4 Dept. Nov 09, 2001) (NO. 1218, 01-01193, *lv. to appeal den.*, 97 N.Y.2d 608, 765 N.E.2d 301, 739 N.Y.S.2d 98 (N.Y. Jan 10, 2002 (TABLE NO. 4-10, 1353), *petition for certiorari filed*, 70 USLW 3643 (April 9, 2002) (No.: 01-1481) 2, 6

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STATEMENT OF FACTS

The Respondent, Oswego County Treasurer and the County Attorney were served with a copy of the within signed Order to Show Cause with restraining provisions, summons, complaint, and annexed exhibits (R.9-26) on September 18, 2000 (R.27, 28).

The aforementioned papers were captioned "*Susan M. Weichert, Plaintiff v. William J. Brouse, Oswego County Treasurer, Defendant*" and bear Oswego County Clerk's Index Number 00-1692. While captioned as an action, this matter seeks relief, such as mandamus to compel, which would otherwise be limited to a special proceeding.

The Order to Show Cause was signed on September 13, 2000 (R.11) according to the Petitioner; the county is unaware as to the exact date of signing, although the face of the order reads August 13, 2000. Petitioner purchased an Index Number and RJI until September 11, 2000 (R.6-8), the same day that the Summons is dated (R.13). The Complaint is dated on August 25th, 2000 (R.19) and is verified on August 31st, 2000 (R.12, 20).

After issue was joined, the Respondent interposed an Answer with various affirmative defenses and exhibits (R.29-47) The first affirmative defense contained therein was that the within proceeding was not properly commenced and, accordingly, *in personam* and subject matter jurisdiction were lacking over Respondent. (R.30-31). In support of said defense, the Respondent also provided to the Court an affidavit from the Oswego County Clerk (R.37) stating that, as of the September 20, 2000, there were no pleadings filed under Index Number 00-1692, including, but not limited to an Order to Show Cause, Summons or Complaint.

This matter came before a Motion Term of New York State Supreme Court, Oswego County, on September 22nd, 2000, before the Hon. Robert J. Nicholson, J.S.C. Petitioner, through counsel, appeared on behalf of the relief sought in the Order to Show Cause and the Respondent, through counsel, appeared in opposition thereto. The Court found that none of the aforementioned pleadings had been filed with the Oswego County Clerk under Oswego County Index Number 00-1692 and were not filed at the time of service upon the Respondent. (R.1-2) The Court also found that subject matter and *in personam* jurisdiction were absent and dismissed this matter *without prejudice* on September 22, 2000 (R.2) The Court did not reach the merits of the underlying action/proceeding. The Order granting the dismissal was signed November 9th, 2000 and was entered with the Oswego County Clerk on November 15th, 2000 (Petition at Appendix D-1, R.3).

Petitioner appealed to the New York State Supreme Court, Appellate Division, Fourth Department which affirmed the Order of Supreme Court, Oswego County on November 9th, 2001 (Petition at Appendix B1, B2 and C1).[2] Petitioner then moved for leave to appeal before the New York State Court of Appeals within the time provided for by statute. By a decision dated January 10th, 2002, the New York State Court of Appeals denied Petitioner's motion for leave to appeal.[3] (Petition at Appendix A-1).

The within Petition for a Writ of Certiorari followed.

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2. *Matter of Weichert v. Brouse*, 288 A.D.2d 841 (Mem.), 732 N.Y.S.2d 186, 2001 N.Y. *Slip. Op.* 08586.

3. *Matter of Weichert v. Brouse*, 97 N.Y.2d 608, 765 N.E.2d 301, 739 N.Y.S.2d 98.

REASONS FOR DENYING THE WRIT

The Respondent would submit that the sole question which should be considered by this Honorable Court is whether or not the underlying proceeding was properly commenced by filing in the first instance and thereby conferring *in personam* and subject matter jurisdiction; the Respondent would respectfully submit that the Courts below have correctly and consistently answered this question in the negative.

The Petition for a Writ of Certiorari now before this Honorable Court attempts to craft a proceeding where one has never actually existed. Petitioner alleges that there have been constitutional violations meriting a review of this Honorable Court. The Petition makes conclusory and misleading allegations regarding the role of the Oswego County Attorney's Office and the Oswego County Clerk in this proceeding. In its simplest form, this case was dismissed on procedural grounds, without prejudice, and that dismissal has been upheld by all New York State Courts before which it was raised. The significant time and effort spent upon perfecting the various appeals herein would have been better-utilized by Petitioner in properly commencing a proceeding within the applicable statute of limitations.

As the New York Courts below have found that there was no subject matter jurisdiction or *in personam* jurisdiction over the Respondent because of the failure to properly commence this proceeding under state law, no important federal questions or constitutional concerns have been raised which would require issuance of the Writ.

Simply, no federal question has been raised by the instant proceeding in a way that it conflicts with the decision of another state court of last resort or the United States Court of Appeals. By declining to grant leave to appeal, the New York State Court of Appeals has merely affirmed itself on a matter of state law only regarding the commencement of special proceedings in the state courts of New York.

Petitioner has averred that there are constitutional violations meriting the review of this Court; these are nothing but bare allegations made by Petitioner and are denied by Respondent. Any property alleged to have been taken for delinquent taxes was properly foreclosed by way of a separate, *in rem* proceeding in New York State Supreme Court which has not otherwise been appealed and is now time-barred. (Petition at 15). Petitioner misstates the holding of the New York State Supreme Court, Appellate Division, Fourth Department in *Matter of Robert M. Weichert v. Brouse*[4]; there, it was affirmed that Robert M. Weichert, only, did not have standing and no other matters were reached. Consistently, in this matter, the Courts of the State of New York have found that jurisdiction is absent and, as such, the within Petition should be denied.

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4. *Matter of Robert M. Weichert v. Brouse*, 720 N.Y.S.2d 77, 278 A.D.2d 952, 2000 N.Y. *Slip Op.* 11515, *lv. to appeal den.*, 725 N.Y.S.2d 278.

I.

PETITIONER HAS NOT ALLEGED ANY COMPELLING REASONS FOR ISSUANCE OF THE WRIT

The Rules of this Court state that the Court will grant a petition for a writ of certiorari "*only for compelling reasons.*" Sup. Ct. R. 10 As regards the state court decision denying leave for appeal to the New York State Court of Appeals, Rules 10(b) and 10(c) describe the "*character of the reasons the Court considers*," which read, in pertinent part, as follows:

> *(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;*
>
> *(c) a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.* Supreme Court Rule 10.

Petitioner did not file the relevant pleadings with the Oswego County Clerk prior to commencing this proceeding as is a substantive and necessary condition precedent to the exercise of judicial authority in New York State superior courts. New York State Supreme Court, Oswego County, in dismissing the proceeding without prejudice, held that *in personam* and subject matter jurisdiction were absent in the underlying proceeding because of Petitioner's failure to

file the initiatory papers. (Petition Appendix at D2). New York State Supreme Court, Appellate Division, Fourth Department, affirmed the Order of the Hon. Robert J. Nicholson, J.S.C. and also found that the complaint was properly dismissed for lack of *in personam* and subject matter jurisdiction.[5]

Petitioner then applied for leave to appeal to the New York State Court of Appeals. Respondent filed a copy of its Appellate Division brief with the Court in opposition thereto. On January 10th, 2002, the New York State Court of Appeals denied Petitioner's motion for leave to appeal.[6] It should be noted that the Appellate Division's November 9th, 2001 decision relied upon two prior cases from the New York Court of Appeals as authority for its decision.[7]

The within Petition followed. While Petitioner's application makes many bare and conclusory allegations in an attempt to couch the Respondent's actions as violative of the United States Constitution and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L. Ed. 2d 180, 103 S. Ct. 2706, the Respondent's actions were never reached or reviewed in the underlying proceeding. This, notwithstanding, the Respondent would deny that his actions were violative of the Petitioner's constitutional rights and applicable state law. The separate, 1998 *in rem* tax foreclosure proceeding (Petition at 5) has not been appealed,

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5. *Matter of Weichert v. Brouse*, 288 A.D.2d 841 (Mem), 732 N.Y.S.2d 186, 2001 N.Y. Slip. Op. 08586.

6. *Matter of Weichert v. Brouse*, 97 N.Y.2d 608, 765 N.E.2d 301, 739 N.Y.S.2d 98.

7. *Matter of Gershel v. Porr*, 89 N.Y.2d 327, 330; *Matter of Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 719-720.

was not preserved for appeal and is not before the Court despite Petitioner's contentions. As the underlying proceeding was properly dismissed on jurisdictional grounds, without prejudice, there are no compelling reasons for this Honorable Court to grant the Writ as there is neither a federal question nor a conflict of authority.

II.

PETITIONER DID NOT PROPERLY FILE ANY OF THE INITIATORY PLEADINGS HEREIN; ACCORDINGLY, NO ACTION OR PROCEEDING WAS COMMENCED AND SUBJECT MATTER AND *IN PERSONAM* JURISDICTION ARE ABSENT

Although the record on appeal and the Petition contain many conclusory allegations about how the Oswego County Clerk's Office works, Petitioner's entitlement to tax deeds, damages and the alleged lack of constitutional notice in a separate, *in rem* tax foreclosure proceeding, the sole issue before this Court is very concise and simple: "*Was the underlying proceeding properly commenced by filing?*"

Since 1992, the actions and proceedings in New York State Supreme Court have been governed by a commencement-by-filing statute, CPLR § 304. CPLR § 304 reads, in pertinent part, as follows:

> *An action is commenced by **filing** a summons and complaint or summons with notice. A special proceeding is commenced by **filing** a notice of petition or order to show cause and a petition . . .*

(Emphasis supplied) McKinney's Civil Practice Law and Rules § 304.

Here, despite the contentions of the Petitioner, the unequivocal proof contained in the Order appealed herein (R.1-2), and the affidavit of the Oswego County Clerk (R.37) clearly demonstrates that no Order to Show Cause, Summons or Complaint were filed under Index Number 00-1692 at the time of service upon the Respondent. Without strict compliance with the applicable statutory provisions, there can be no action or proceeding and, accordingly, no subject matter jurisdiction or *in personam* jurisdiction over the Respondent herein.

The duly interposed answer (R.29-47) of the Oswego County Treasurer raised several affirmative defenses, including procedural commencement-by-filing and jurisdictional defenses (R.30-31), so that any objections to procedural compliance and *in personam* jurisdiction have not previously been waived and have been preserved for appeal.[8] The limited appearance for the purposes of this application should not be construed as a consent to *in personam* jurisdiction over Respondent in the underlying proceeding.

The Petitioner is adamant that the purchase of a time-stamped index number application and RJI constitutes a "filing" for the purposes of CPLR § 304. Perhaps as a safeguard the drafters of CPLR § 304 also required that any papers filed with the clerk, be date stamped, and a copy returned. That provision continues, in part, as follows:

> *. . . At the time of filing, the* ***filed papers shall be date stamped by the clerk*** *of the court who shall file them and maintain a record of the date of the filing* ***and who shall return forthwith a date***

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8. *Venditti v. Town of Alden*, 239 A.D.2d 910, 659 N.Y.S.2d 628 (4th Dept. 1997).

> ***stamped copy**, together with an index number, to the filing party . . .*[9] (Emphasis supplied)

It should be noted that none of the initiatory papers contained in the Record on Appeal, to-wit: the Order to Show Cause (R.9), the Summons (R.13) or the Complaint (R.14), have been date-stamped by the Oswego County Clerk. Moreover, the Oswego County Clerk, upon reviewing his file, has found no pleadings whatsoever filed under the within index number (R.37).

It is undisputed that the Petitioner purchased an index number, for, if she hadn't, there would not be an index number for this action in the first instance. However, a mere index number application does not a filing make. According to the above-referenced provision of CPLR § 304, a date-stamped pleading would be *prima facie* proof of filing; therefore, an adverse inference should be drawn against Petitioner as she has been unable to produce any initiatory pleadings so endorsed by the clerk, nor are there any such papers in the county clerk's file or contained in the record on appeal.

On September 20th, 2000, the Oswego County Clerk personally examined the file maintained by his office for Index Number 00-1692 and found "*. . . no pleadings filed under said index number including, but not limited to, a summons and complaint and an order to show cause (signed or unsigned) . . .*" according to the affidavit of George J. Williams, County Clerk, of even date. (R.37) The clerk also noted that no notice of pendency or notice of claim had been filed for this action (R.37).

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9. McKinney's New York Civil Practice Law and Rules § 304.

Despite Appellant's strenuous contentions to the contrary, it is indeed possible to purchase an index number and RJI *without* first filing any papers with the Oswego County Clerk. Apparently, that is what the Petitioner did in the instant action as the Request for Judicial Intervention (RJI) and Index number application are date-stamped. However, obtaining an index number, paying the requisite fee and purchasing an RJI are not tantamount to "filing" pleadings with the County Clerk or the commencement of an action or proceeding for the purposes of CPLR § 304.

In light of same, Supreme Court, Oswego County, (Hon. Robert J. Nicholson, J.S.C.) in dismissing this action, and upon reviewing the affidavit of the Oswego County Clerk (Petition Appendix at D2-D3, R.37), held that

> *. . . it appearing to the Court that* ***none of the aforementioned pleadings have been filed with the Oswego County Clerk under the above-referenced index number, nor were they filed at the time of the service of same upon Respondent as is a substantive and necessary condition precedent to the exercise of judicial authority****, and it further appearing to the Court that in personam jurisdiction over the Respondent and subject matter jurisdiction are, accordingly, absent . . . it is hereby . . . ORDERED that the within Order to Show Cause and Complaint are hereby dismissed, in their entirety, without prejudice.* (Emphasis supplied) (Petition Appendix at D2-D3, R.2).

Moreover, as Petitioner contends, the Office of the County Attorney has not ". . . *formulated and implemented . . . the procedures and policy . . .*" of the Oswego County

Clerk. (R.4) The Oswego County Clerk, George J. Williams, has been County Clerk for approximately 22 years and is responsible for formulating his own policies and procedures, and does so of his own accord, in accordance with state law and upon the advice of the Court, the NYS Association of County Clerks and this office.

The Oswego County Clerk will routinely sell Index Numbers and RJIs without any papers being "*filed*" contemporaneously therewith. For injunctions and show cause orders, many practitioners, including this one, will purchase an index number and RJI and walk the RJI and unsigned order to show cause over to the Oswego County Court House, right next door. This ensures receipt by the Court Clerk's Office for transmittal to the *ex parte* Justice and, in the event of a stay or injunction, as is the case here, allows a more timely issuance/denial of the injunction. Upon return of a signed Order to Show Cause to the applicant by Supreme Court Chambers, the normal practice is that the signed pleadings are then filed with the County Clerk, and a date-stamped copy returned to the applicant prior to service — something which obviously did not occur here. Especially if statute of limitations concerns are implicated, the safer course would be to file a notice of petition/summons and petition/complaint first, and seek a show cause order later, something which also did not occur in the instant matter.

Assuming, *arguendo*, that the county clerk's office staff placed the unsigned Order to Show Cause, RJI and supporting papers to a Supreme Court Clerk in inter-office mail upon the purchase of an index number and RJI that act, alone, does not constitute a "filing" as the papers are not filed at that time and because an unsigned Order to Show Cause is of no jurisdictional effect.

Here, the Petitioner opted to proceed by an Order to Show Cause, Summons and Complaint, although this appears to be a hybrid action/special proceeding. Petitioner is seeking damages for breach of contract, to annul the issuance of a tax deed, mandamus to compel the Respondent to issue a deed, quiet title and other relief in one action/proceeding (R.18-19). Some of the apparent relief sought falls under Article 78 of the CPLR, Article 15 of the Real Property Actions and Proceedings Law and Article 11 of the Real Property Tax Law, and would, by necessity, be brought in a special proceeding, not an action.

To the extent that an initiatory Order to Show Cause is also involved herein, the commencement of the instant case is not at all inapposite to *Matter of Fry v. Village of Tarrytown*, 89 N.Y.2d 714. In *Fry*, Judge Ciparick aptly held that:

> *[s]ince an unexecuted order to show cause is of no legal effect (c.f. CPLR§2214[d], 2219[a]), its filing did not satisfy the provision of the commencement-by-filing statute requiring petitioner to file an order to show cause or a notice of petition alone with the petition . . . Therefore,* ***petitioner's failure to file the proper papers with the clerk of the court, and the attendant failure to commence the special proceeding, rendered the proceeding subject to dismissal.***[10] (Emphasis supplied)

Thus, Petitioner, if correct in its assertions, would have had to file both an unexecuted Order to Show Cause with a Summons and Complaint to "commence" the action and then file an executed copy thereof to comply with *Fry*, *supra*.

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10. *Matter of Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 717. *See also Matter of Gershel v. Porr*, 89 N.Y.2d 327, 332; *Matter of Vetrone v. Mackin*, 216 A.D.2d 839, 841.

If that did, in fact, occur, surely the Court, the Oswego County Clerk or the Respondent would have time-stamped pleadings in their possession, something which are markedly absent in this case.

Under the new commencement-by-filing provisions in CPLR § 304 "*service of process without **first paying the filing fee and filing the initiatory papers is a nullity**, the action never having been properly commenced*" in the first instance.[11] (Emphasis supplied). While the index number fee was paid in the instant matter, the papers, simply, were never filed with the County Clerk. (R.37).

Since a court cannot exercise subject matter jurisdiction over a matter which has not properly been brought before it, or personal jurisdiction over hypothetical parties, compliance with the commencement-by-filing system is a "*substantive and necessary condition precedent to the exercise of judicial authority.*" *Id.* at 725.

Here, Petitioner purchased an index number, but did not file the summons, complaint or order to show cause (signed or unsigned) (R.37). Service of a summons and complaint without purchasing an index number does not "commence" an action under CPLR § 304.[12] It would seem to follow, then, that purchasing an index number but not filing a summons and complaint (or show cause order) thereunder, as is the case here, would also not "commence" an action unless and until the pleadings are first filed and secondly served.

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11. *Matter of Fry v. Village of Tarrytown*, *supra*, 89 N.Y.2d 714, 719, *citing Gershel v. Porr*, 89 N.Y.2d 327, 330.

12. *Saunders v. Central Brooklyn Coordinating Council, Inc.*, 273 A.D.2d 294, 708 N.Y.S.2d 709 (2d Dept. 2000).

The courts of this State have clearly held that an action is now "commenced" when a summons is filed.[13] To hold otherwise would turn CPLR § 304 upside down and create severe statewide problems as to exactly when an action was actually "commenced" for statute of limitations purposes.

To the extent that the underlying proceeding appears to be a hybrid action/ special proceeding, the same rule applies for the commencement of a special proceeding and the filing of the Order to Show Cause, Petition or Notice of Petition; it is quite clear that the papers must be *filed* with the clerk to *commence* the proceeding.[14]

Where service of process is accomplished without filing, the resulting proceeding is a nullity, it not having been properly commenced, and such non-filing constitutes a non-waivable jurisdictional defect.[15]

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13. *Rybka v. New York City Health and Hospital Corp.*, 263 A.D.2d 403, 404, 693 N.Y.S.2d 566 (1st Dept. 1999); *see Matter of Gershel v. Porr*, 89 N.Y.2d 327, 330, 653 N.Y.S.2d 82, 675 N.E.2d 836 (1996).

14. *See* CPLR § 304; *Matter of Spodek v. New York State Commissioner of Taxation & Finance*, 85 N.Y.2d 760, 763, 628 N.Y.S.2d 256, 651 N.E.2d 1275.

15. *Matter of Parkinson v. Leahy*, 277 A.D.2d 810, 811, 716 N.Y.S.2d 752, 754 (A.D. 3d Dept. 2000); *Matter of Gershel v. Porr*, 89 N.Y.2d 327, 330, 653 N.Y.S.2d 82, 675 N.E.2d 836; *Connolly v. Chenot*, 275 A.D.2d 583, ___, 712 N.Y.S.2d 234, 237.

III.

PETITIONER AVERS THAT THE ORDER TO SHOW CAUSE WAS TIME-STAMPED; THIS IS UNSUPPORTED BY THE RECORD ON APPEAL

In her Brief on Appeal to the Appellate Division, Fourth Department, Petitioner averred that ". . . *the time stamp on the order to show cause, the signature of the Hon. John J. Elliott on the order to show cause clearly show and indicate that Petitioner/appellant did file and record the application for order to show cause . . . with the Oswego County Clerk on September 11, 2000.*" (Petition at 7, Petitioner's Brief on Appeal to the Appellate Division, Fourth Department, pp. 4-5).

The Order to Show Cause contained in the Record on Appeal (R.9-11) and as presented before the lower courts is clearly devoid of any time stamp or other endorsement from the Oswego County Clerk, as are the underlying summons and complaint. Additionally, Petitioner's affidavits of service do not contain a time-stamp from the clerk. (R.27-28).

Appellate review of this matter was limited in the state courts to the record made before Supreme Court, Oswego County.[16] To date, Petitioner has yet to produce a single pleading which has been time-stamped by the Oswego County Clerk or to rebut the County Clerk's sworn affidavit (R.37) that there are no pleadings filed under Index Number 00-1692. Respondent Brouse would respectfully submit that the determination of Supreme Court, Oswego County (R.1-2) as

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16. *Matter of Bligen v. Kelly*, 126 A.D.2d 989, 511 N.Y.S.2d 985 (4th Dept. 1987); *Hughes v. Nussbaumer, Clarke & Velzy*, 140 A.D.2d 989, 529 N.Y.S.2d 726 (4th Dept. 1988).

based, in part, upon the affidavit of the Oswego County Clerk (R.37), should control as to what papers were or were not filed, as Petitioner's allegations on appeal as to time-stamped pleadings are unsupported by the appellate record.

The dismissal for failure to comply with the commencement-by-filing rules as outlined in the Order of the Honorable Robert J. Nicholson, J.S.C (Petition Appendix D-1, R.1) and the Affidavit of the Oswego County Clerk (R.37) are presumptive evidence that no pleadings were indeed filed in the within proceeding with the Oswego County Clerk.

Petitioner's prior attempts to argue that the "*. . . lower court should have reconstructed any missing papers from Petitioner's and Respondent's files; should have investigated the whereabouts of the original papers filed, and of the circumstances of their disappearance while in the hands of the Combined Court System . . .*" (Petitioner's Brief on Appeal to the Appellate Division, Fourth Department, page 5) were neither originally requested at the return date of the Order to Show Cause nor are supported by the record on appeal. Petitioner cannot properly raise new facts on appeal. If Petitioner did indeed have time-stamped pleadings from the Oswego County Clerk, she has neglected to produce them at the return date of the Order to Show Cause, on the return date of the First Restoral and has neglected to include them her record on appeal before the New York State Courts; she is now foreclosed on the record from producing same. *Id.*

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD C. MITCHELL
OFFICE OF THE OSWEGO COUNTY ATTORNEY
Attorneys for Respondent
Legislative Office Building
46 East Bridge Street
Oswego, New York 13126-2137
(315) 349-8296

(3)

Supreme Court, U.S.
FILED
MAY 30 2002
OFFICE OF THE CLERK

No. 01-1481

In The

Supreme Court of the United States

Term, 2002

SUSAN M. WEICHERT,

Petitioner,

against

WILLIAM J. BROUSE, Treasurer of County of Oswego,

Respondent.

On Appeal from the Court of Appeals
State of New York

PETITIONER'S REPLY BRIEF IN OPPOSITION

Bert F. Halderman, Esq.
Of Counsel to Petitioner
6075 East Molloy Road, Bldg. 6
Syracuse, New York 13211
(315) 432-9896

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7 pp

REPLY TO BRIEF IN OPPOSITION

This reply brief is filed by petitioner, pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States.

Addressing the arguments first raised in the brief in opposition, petitioner respectfully alleges and shows to the Court as follows:

1. PETITIONER FILED THE SUMMONS AND COMPLAINT, PURSUANT TO CPLR §304, TO COMMENCE THE UNDERLYING PROCEEDING.

Petitioner and respondent are in agreement that this is the sole issue before this Court. Should this Court find for the appellant, this case should be remanded for further proceeding, and trial of the issues raised in the complaint.

It is undisputed that petitioner purchased an index

number, and the receipt thereof is time-stamped. Respondent concedes that a date-stamped pleading would be *prima facia* proof of filing. The date-stamped receipt for index number; the date stamped Request for Judicial Intervention (RJI); the issuance of the RJI, #37-00-0461, issued by the Clerk, and assigning Judge Nicholson; and the original initials and signature of the Honorable John J. Elliott, AJSC on the order to show cause, wherein it is stated, **"...upon the summons herein and the annexed complaint"**, clearly show, that the summons and complaint were filed and attached by a staple to the order to show cause, which was attached by a staple to the RJI which was time-stamped by the Clerk of Oswego County September 11, 2000. That clearly should be *prima facia* proof of filing.

In addition, this Court can take judicial notice of the procedure of the combined-court system of the State of New York, Oswego County, that no index number and RJI can be purchased at the Clerk's office without filing, at the same time, the original summons and complaint.

The person actually receiving and filing the original summons and complaint, and who time-stamped the RJI and index number receipt was Paula Ferdett. Petitioner contacted Paula Ferdett for a voluntary affidavit, swearing that she received and filed the said original papers, as an employee of the Oswego County Clerk, but she declined for fear of losing her job. On remand and discovery, petitioner is confident that Paula Ferdett if deposed, would verify the filing of the original summons and complaint.

Respondent suggests that the County Clerk could

time-stamp the receipt of the RJI, with attached order to show cause and summons and complaint, but not "file" them. And, at the same time, concedes that the date-stamped pleading would be *prima facia* proof of filing. This position is contradictory, untenable and flawed.

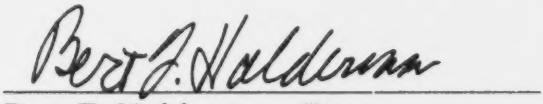
The summons and complaint were clearly "filed".

2. THE CONSTITUTION OF THE UNITED STATES, and especially the rights protected by the due process clause of the 5th and 14th Amendments thereto, were adopted to preclude just such abuse, that is, that petitioner's due process rights have been thwarted by those in authority in Oswego County, the combined-court system, in losing petitioner's filed summons and complaint, and then dismissing this action on the basis of such wizardry. Respondent would have this Court believe

that a violation of petitioner's due process is not a compelling reason for this Court to grant a petition for writ of certiorari. We disagree. What affects one citizen, affects all.

It is noteworthy that these constitutional issues were raised and preserved in all of the Courts below, which decision conflicts with relevant decisions of this Court. Supreme Court, Rule 10.

Dated: May 14, 2002.



Bert F. Halderman, Esq.
Of Counsel to Petitioner
6075 E. Molloy Road, Bldg. 6
Syracuse, New York 13211
(315) 432-9896